

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEBARAH HENDRIX,

Plaintiff,

10

MICHAEL J. ASTRUE,

Defendant.

CASE NO. C11-5483 TSZ

ORDER

THIS MATTER comes before the Court on plaintiff's objections, docket no. 25, to

the Report and Recommendation (“R&R”) of United States Magistrate Judge James P.

17 ||| Donohue, docket no. 24. With respect to plaintiff Debarah Hendrix's appeal from a final

¹⁸ decision of the Commissioner of the Social Security Administration (the

19 || “Commissioner”) denying her application for Disability Insurance Benefit

²⁹ Supplemental Security Income under Titles II and XVI, respectively, of the Social Security Act.

²¹ See also A. & 42 U.S.C. §§ 401, 422, 11281, 11282E-1, R&R, 1, 1, 1, 1, 1, 1.

1 Plaintiff objects to the R&R's recommendation to affirm the Commissioner's
 2 analysis, which concluded that plaintiff does not suffer from a severe mental impairment.
 3 Plaintiff makes four objections: (1) The R&R improperly cites reasons not used by the
 4 ALJ to justify rejecting the opinion of Dr. Lindgren, Plaintiff's Objections at 7; (2) The
 5 ALJ's failure to discuss the opinion of Ms. Ragan was not harmless error, Plaintiff's
 6 Objections at 8; (3) The ALJ did not give sufficient reasons for rejecting the opinions of
 7 Drs. Gardner, Lewis, and Derbin, Plaintiff's Objections at 12; and (4) The ALJ did not
 8 give specific and legitimate reasons for rejecting the opinions of Drs. Carter and Alvord,
 9 Plaintiff's Objections at 14.

10 The Court agrees with plaintiff's first two objections, but the Court ADOPTS the
 11 remainder of the R&R as discussed below. The first objection correctly points out that
 12 the ALJ did not specifically rely on plaintiff's lack of credibility or Ms. Muth's opinion
 13 to justify discounting Dr. Lindgren's opinion.¹ The Court REJECTS that portion of the
 14 R&R, but ADOPTS the R&R's remaining analysis of Dr. Lindgren's opinion.² The final
 15 two objections, relating to the opinions of Drs. Gardner, Lewis, Derbin, Carter, and

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 17 ¹ The ALJ does note, however, that Dr. Lindgren's diagnoses are based on self-reports (AR 633) and highlights plaintiff's lack of credibility throughout her decision.

18 ² In addition, the Court is satisfied that Dr. Lindgren's opinion was properly considered by the
 19 ALJ because: (i) Dr. Lindgren's treatment notes truly "make[] it difficult to judge the severity of
 20 the claimant's alleged mental impairment" (AR 634); and (ii) Dr. Lindgren does not offer an
 21 opinion directly on plaintiff's functional ability. Plaintiff urges that Dr. Lindgren's diagnoses
 22 implicitly incorporate language from the DSM: "symptoms markedly interfere with occupational
 23 functioning or with usual social activities or relationships with others." Plaintiff's Objections,
 docket no. 25, at 6 (quoting American Psychiatric Association, Diagnostic and Statistical Manual
of Mental Disorders 413 (4th ed., Text Revision, 2000)). Even if this language is inferred from
 Dr. Lindgren's diagnoses, it does not speak to whether plaintiff's condition "significantly
 interferes with [her] physical or mental ability to do basic work activities," (20 CFR §
 404.1520(c)) and does not constitute an opinion directly on her functional ability.

1 Alvord, reiterate arguments fully presented to Judge Donohue. Compare Plaintiff's
2 Objections at 12-20 with Plaintiff's Opening Brief, docket no. 18, at 17-24. Judge
3 Donohue gave these arguments full consideration, and the Court ADOPTS the portions of
4 the R&R concerning Drs. Gardner, Lewis, Derbin, Carter, and Alvord.

5 The Court therefore addresses plaintiff's remaining objection that the ALJ's
6 failure to discuss Ms. Hendrix's therapist's opinion was not harmless error. Having
7 reviewed the R&R, plaintiff's objections, and the remaining record, the Court enters the
8 following Order.

9 **Discussion**

10 **A. Standard of Review**

11 The Commissioner has established a five-step sequential process for determining
12 whether a claimant is disabled within the meaning of the Social Security Act. 20 C.F.R.
13 §§ 404.1520(a)(4) & 416.920(a)(4). Step one inquires whether the claimant is presently
14 engaged in "substantial gainful activity." 20 C.F.R. §§ 404.1520(b) & 416.920(b); see
15 also 20 C.F.R. § 404.1572. Step two asks whether the claimant has a severe impairment,
16 or a combination of impairments, that significantly limits the claimant's physical or
17 mental ability to do basic work activities. 20 C.F.R. §§ 404.1520(c) & 416.920(c). Step
18 three involves a determination of whether any of claimant's severe impairments is
19 equivalent to one that is listed in the regulations. 20 C.F.R. §§ 404.1520(d), 416.920(d).
20 A claimant with an impairment that "meets or equals" a listed impairment for the
21 requisite twelve-month duration is per se disabled and qualifies for benefits.

1 If the claimant is not per se disabled, then the question under step four is whether
2 the claimant's residual functional capacity enables the claimant to perform past relevant
3 work. 20 C.F.R. §§ 404.1520(e) & (f) and 416.920(e) & (f). If the claimant can still
4 perform past relevant work, then the claimant is not entitled to disability benefits and the
5 inquiry ends there. On the other hand, if the opposite conclusion is reached, the burden
6 shifts to the Commissioner at step five to prove that the claimant can make an adjustment
7 to other work, taking into account the claimant's age, education, and work experience.
8 20 C.F.R. §§ 404.1520(g) & 416.920(g). If the claimant cannot make such adjustment to
9 other work, disability benefits may be awarded.

10 This Court's review of a decision reached via this five-step process is limited to
11 assessing whether the Commissioner's denial of benefits is free of legal error and based
12 on factual findings that are supported by substantial evidence. *Tidwell v. Apfel*, 161 F.3d
13 599, 601 (9th Cir. 1998); *see* 42 U.S.C. § 405(g).

14 The Ninth Circuit has held that "where the ALJ's error lies in a failure to properly
15 discuss competent lay testimony favorable to the claimant, a reviewing court cannot
16 consider the error harmless unless it can confidently conclude that no reasonable ALJ,
17 when fully crediting the testimony, could have reached a different disability
18 determination." *Stout v. Com'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006).

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1 **B. ALJ's Decision at Step Two**

2 The focus of plaintiff's objections to the R&R is the ALJ's decision at step two of
3 the analysis. The ALJ concluded that plaintiff did not have a severe mental impairment.³
4 AR 635. This decision was based in part on failing to consider the opinion of her
5 therapist, Ms. Ragan, regarding plaintiff's fitness to work. The R&R concluded that the
6 ALJ's failure to consider Ms. Ragan's opinion was error but that it was harmless error
7 because (i) the ALJ thoroughly considered other evidence of record from other
8 practitioners in the same facility, and (ii) Ms. Ragan's opinions would have been formed
9 based on self-reports from an unreliable plaintiff. R&R at 13. The R&R concluded that
10 under such circumstances, a reasonable ALJ could not have reached a different disability
11 determination. *Id.* Plaintiff objects to the R&R's conclusion that the ALJ's failure to
12 discuss her therapist's opinion was harmless error. Plaintiff's Objections at 8.

13 The Court declines to accept the R&R's harmless error conclusion. A reasonable
14 ALJ could conclude that (i) the opinions of the other practitioners at Columbia River,
15 who had less contact with plaintiff than Ms. Ragan, are inadequate substitutes for Ms.
16 Ragan's opinion; (ii) Ms. Ragan's opinions were formed knowing that plaintiff was
17 unreliable; (iii) Ms. Ragan's opinions were formed based on her direct observations of
18 plaintiff in addition to her self-reports; and (iv) the Commissioner views as important the
19 opinion of practitioners like Ms. Ragan. Giving such credit to Ms. Ragan's opinion, a

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22 ³ The ALJ did conclude that plaintiff had a severe knee disability, AR 631, so the ALJ's analysis at steps three
23 through five considered only the knee condition.

1 reasonable ALJ could have reached a different conclusion at step two of the disability
2 determination and found that plaintiff suffers from a severe mental impairment.

3 **1. Other Practitioners at Columbia River**

4 Janet Ragan, MA, LMHC, was a counselor associated with Columbia River
5 Mental Health who was plaintiff's primary clinician and who saw her over 100 times
6 from 2005 through the hearing. AR 417-18, 420-28, 430-43, 445-53, 481-509, 873-901,
7 937-59, 1044-64, 1066-75. As her primary clinician at Columbia River Mental Health,
8 Ms. Ragan was contacted by Jerry Gardner, Ph.D. as part of the SSA disability review
9 process, and Dr. Gardner noted: "Ms. Ragan hopes that the claimant can work part time
10 but she will need a quiet setting and low stress work"; and that she "has a strong sense
11 that the claimant is not ready for full time work as she would very likely decompensate
12 with that much stress." AR 769.

13 The Court disagrees with the R&R's conclusion that the ALJ's failure to consider
14 Ms. Ragan's opinion is ameliorated because she considered evidence from two other
15 practitioners from Columbia River, Dr. Lindgren and Ms. Muth. R&R at 13. Ms. Ragan
16 was plaintiff's primary clinician at Columbia River Mental Health. See, e.g., AR 422.
17 The ALJ considered records from ten visits with Dr. Lindgren, AR 419, 429, 444, 510-
18 517, and one visit with Ms. Muth, AR 405-14. Dr. Lindgren does not summarize or
19 discuss any of Ms. Ragan's observations, and Ms. Muth only briefly mentions Ms.
20 Ragan's treatment. AR 408. A reasonable ALJ could conclude that the notes from Dr.
21 Lindgren and Ms. Muth do not incorporate or fairly reflect the findings and opinions of

1 Ms. Ragan and that they are not adequate substitutes for Ms. Ragan's voluminous
2 treatment notes and her explicit opinion regarding plaintiff's ability to return to work.

3 **2. Ms. Ragan's Knowledge of Plaintiff's Unreliability**

4 The Court also disagrees with the R&R's conclusion that the failure to consider
5 Ms. Ragan's opinion was harmless because "the necessary reliance on self-reporting that
6 serves as the underpinning for Ms. Ragan's opinions." R&R at 13. An ALJ could find
7 that over the course of years of treatment, Ms. Ragan has learned that plaintiff's self-
8 reports may not be accurate, sometimes remarking about her unreliability or observing
9 behavior inconsistent with her statements: "[Ms. Hendrix] requested the presence of her
10 caregiver ('helps me keep the facts straight.')" AR 1061. "A great deal of the
11 information seems to be not what she can actually remember, but what she has been told
12 by family and by the newspaper reports." AR 484. Plaintiff "continues to be concerned
13 regarding... memory issues." AR 1050. "Although she said she understood the
14 paperwork and signed it, I feel that reviewing it again is warranted." AR 452. "Deborah
15 expressed being 'very, very tired.' However, she was alert and able to focus on and
16 participate in the therapy process." AR 403. If Ms. Ragan's opinion was formed with
17 knowledge of plaintiff's unreliability, such unreliability is no reason to discount her
18 opinion. See Ryan v. Com'r of Soc. Sec. Admin., 528 F.3d 1194 (2008) ("[A]n ALJ does
19 not provide clear and convincing reasons for rejecting an examining physician's opinion
20 by questioning the credibility of the patient's complaints where the doctor does not
21 discredit those complaints and supports his ultimate opinion with his own
22 observations.").

3. Ms. Ragan's Direct Observation of Plaintiff

2 A reasonable ALJ could find that Ms. Ragan’s opinions are trustworthy because
3 they were formed not only by plaintiff’s self-reports, but also through her direct
4 observation. During nearly every session, Ms. Ragan observed plaintiff’s appearance,
5 timeliness and mood, along with her ability to focus, maintain eye contact, or initiate
6 conversation. Ms. Ragan was able to observe plaintiff’s demeanor across several
7 sessions as she confronted both major and minor life events, such as her disability claim
8 denials, AR 873-80, 1048-62, coping with the anniversary of past traumas, AR 481-82,
9 431, 433-34, 436, finding housing, AR 949-52, and attempting to volunteer, AR 435,
10 1054, 1058-62. Ms. Ragan’s extensive first-hand observation put her in a unique position
11 among plaintiff’s other providers and examining physicians to gauge plaintiff’s capacity
12 to cope with stress and in what type of setting. A reasonable ALJ could give great weight
13 to Ms. Ragan’s assessment.

4. The Commissioner's Guidance Regarding Sources Who Are Not "Medically Acceptable Sources"

The Commissioner has noted that opinions such as those from Ms. Ragan are “important”:

With the growth of managed health care in recent years and the emphasis on containing medical costs, medical sources who are not “acceptable medical sources,” such as nurse practitioners, physician assistants, and licensed clinical social workers, have increasingly assumed a greater percentage of the treatment and evaluation functions previously handled primarily by physicians and psychologists. Opinions from these medical sources, who are not technically deemed “acceptable medical sources” under our rules, are important and should be evaluated on key issues such as impairment severity and functional effects, along with the other relevant evidence in the file.

1 SSR 06-03p (emphasis added). And such opinions should be evaluated using similar
2 factors as used for acceptable medical sources:

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- 4 • How long the source has known and how frequently the source has
seen the individual;
- 5 • How consistent the opinion is with other evidence;
- 6 • The degree to which the source presents relevant evidence to
support an opinion;
- 7 • How well the source explains the opinion;
- 8 • Whether the source has a specialty or area of expertise related to
the individual's impairment(s), and
- 9 • Any other factors that tend to support or refute the opinion.

10 *Id.*

11 Consideration of these factors suggests Ms. Ragan's opinion could be given great
12 weight. First, Ms. Ragan treated plaintiff at greater frequency and over a much longer
13 duration than any other practitioner or physician, from June 2005, AR 453, through 2010,
14 AR 1044. Second, Ms. Ragan's opinion suggesting plaintiff requires a low-stress work
15 environment is supported by her ample treatment notes, including her observation: "It is
16 difficult to identify [a job] which would not have the potential to trigger her PTSD." AR
17 879. Further, Ms. Ragan's notes document plaintiff's difficulty answering questions
18 related to her disability, even with her own lawyer, AR at 431, and that she even finds it
19 "disturbing to relive the trauma through the answering of questions" of a medical
20 provider, AR 491. Plaintiff described a psychological evaluation for her disability claim
21 that caused her "increased anger, headaches, and flashbacks" and she reported losing
22 focus when asked repeated questions. AR 1060. Ms. Ragan's observations corroborate
23 plaintiff's subjective reports, noting that plaintiff had dark circles under her eyes and "her
body posture was tense as she related her experience." AR 1060. Such anxiety and

1 distress is consistent with the observations of plaintiff's examining physicians and could
2 explain her poor performance during psychological evaluations. The third and fourth
3 factors are difficult to evaluate, as Ms. Ragan's opinion was captured by Dr. Gardner, and
4 it is unclear the extent to which she presented evidence or how well she explained her
5 opinion. Ms. Ragan's treatment notes, however, provide corroborating evidence as
6 described above. Fifth, there is no evidence in the record to suggest that Ms. Ragan has a
7 specialty in PTSD or depressive disorders, but the record does not reflect that any other
8 providers or examining physicians have expertise in PTSD or depressive disorders. A
9 reasonable ALJ could evaluate these factors and conclude that Ms. Ragan's opinion is
10 entitled to significant weight.

11 Giving such weight to Ms. Ragan's opinion that plaintiff is capable of only part-
12 time work, a reasonable ALJ could have reached a different conclusion at step two of the
13 disability determination and found that plaintiff was significantly limited in her ability to
14 do basic work activities. At step five of the disability determination process, inability to
15 sustain work-related activities on a regular and continuing basis (i.e. 8 hours a day, for 5
16 days a week, or equivalent) results in a disability determination. See SSR 96-8p;
17 Rodriguez v. Bowen, 876 F.2d 759, 763 (9th Cir. 1989) (case predating SSR 96-8p, where
18 the court concluded that "the capability to work only a few hours per day does not
19 constitute the ability to engage in substantial gainful activity"). It follows that an
20 inability to perform full-time work due to a mental impairment would qualify that

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1 impairment as severe.⁴ Thus, the Court cannot conclude that the error was harmless as to
 2 step two of the disability determination process.

3 **C. ALJ's Decision at Steps Three through Five**

4 The error at step two was propagated through steps three through five of the
 5 disability determination process. The ALJ did not consider a severe mental impairment
 6 at step three. At steps four and five, the vocational expert was not asked about limitations
 7 like those suggested by Ms. Ragan, and the assessments of plaintiff's Residual Functional
 8 Capacity, ability to perform past relevant work, and ability to make an adjustment to
 9 other work did not account for her opinion. Thus the Court cannot conclude that a
 10 reasonable ALJ would not have come to a different disability determination.

11 **Conclusion**

12 The failure to consider Ms. Ragan's opinion was not harmless error. A reasonable
 13 ALJ, crediting Ms. Ragan's opinion, could have concluded plaintiff suffers from a severe
 14 mental impairment. This impairment could meet or equal a listed impairment or prevent
 15 plaintiff from performing her past relevant work, and the Commissioner failed to
 16 establish that with such impairment, she could adjust to other work.

17 For the foregoing reasons, the R&R, docket no. 24, is ADOPTED in part,
 18 MODIFIED in part, and REJECTED in part. The R&R's conclusion that the ALJ did not
 19 err in discounting Dr. Lindgren's opinion is MODIFIED to delete the references to Ms.

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 21 ⁴ *See also Smith v. Astrue*, 1:08-CV-91-JVB, 2009 WL 2840911 at *7 (N.D. Ind. Sep. 1, 2009)
 22 (holding that ALJ's conclusion that plaintiff did not have a severe impairment while failing to
 23 address treating physician's opinion that plaintiff was not capable of full-time work was not
 harmless error).

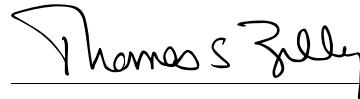
1 Muth's opinion and plaintiff's credibility. The R&R's conclusion that the ALJ's failure
2 to consider Ms. Ragan's opinion was error is ADOPTED, but the conclusion that such
3 error was harmless is REJECTED. The remainder of the R&R, finding no error with the
4 ALJ's evaluation of other medical evidence, is ADOPTED.

5 This matter is hereby REMANDED to the Commissioner for further proceedings
6 as to step two of the sequential process for determining whether plaintiff is disabled. On
7 remand, the ALJ is free to obtain additional evidence and/or supplemental testimony. If a
8 different conclusion as to step two is reached, the ALJ shall hold a supplemental hearing
9 to consider anew (i) whether plaintiff's combination of impairments meets or medically
10 equals the criteria of an impairment listed in 20 CFR Part 404, Subpart P, Appendix 1 (20
11 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925, and 416.926), (ii) whether
12 plaintiff is able to perform past relevant work, and (iii) whether the Commissioner has
13 met the burden of establishing that plaintiff can make an adjustment to other work.

14 IT IS SO ORDERED.

15 The Clerk is directed to send a copy of this Order to all counsel of record and to
16 Magistrate Judge Donohue.

17 Dated this 16th day of July, 2012.

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19 THOMAS S. ZILLY
20 United States District Judge
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